No. 80-1680

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In the Supreme Court of the United States

OCTOBER TERM, 1980

CHEVRON CHEMICAL COMPANY, PETITIONER

v.

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ANNE S. ALMY
PATRICK J. CAFFERTY, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, in issuing pesticide registrations under the Federal Insecticide, Fungicide, and Rodenticide Act to firms other than petitioner, EPA is authorized to consider hazard and efficacy data that are contained in its files and that were submitted to the government by petitioner before 1970 in support of petitioner's own registrations for pesticides.

2. Whether, assuming that such agency consideration of the data is authorized, it constitutes a taking of any trade secrets contained in those data, and, if so, whether an injunction is the proper remedy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 through A-28) is reported at 641 F.2d 104. The opinion of the district court (Pet. App. A-30 through A-60) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1981. A petition for rehearing was denied on March 3, 1981 (Pet. App. A-67). The petition for a writ of certiorari was filed on April 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1947, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), now codified at 7 U.S.C. (& Supp. III) 136 *et seq.*, has required pesticide manufacturers to register their products before those products could be sold in the United States. Before 1970, registrations were granted by the United States Department of Agriculture (USDA); the Food and Drug Administration (FDA) was responsible for issuing tolerances to manufacturers for those pesticides that are applied to food and feed crops.[1] Since 1970 the Environmental Protection Agency (EPA) has performed both those functions. 7 U.S.C. (& Supp. III) 136a; 21 U.S.C. 346a.

The agency's decision whether to register a particular pesticide product depends upon its evaluation of both the effectiveness of the product and the dangers that the pesticide residue poses to consumers who will be exposed to those residues in food. To carry out these regulatory responsibilities, EPA and its predecessors have required manufacturers to submit a variety of test data in support of applications for registrations and petitions for tolerances. These data define the risks and benefits of the products for which registration is sought and generally include test data reflecting the effectiveness of the pesticides in performing their pest suppression function ("efficacy data") and test results concerning the

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[1] A "tolerance" defines the level of the pesticide product and its degradation products which cannot be exceeded in food. The level at which a tolerance is set is the level required to protect the public from adverse health effects caused by pesticides. See 21 U.S.C. 346a(b).

dangers of the product ("hazard data").[2] Whether EPA may disclose such data to the public or may consider the data in assessing applications by persons other than the data-submitters has been the subject of extensive debate during the past decade, and Congress has produced several differing solutions. Petitioner's suit challenges the latest statutory amendment relating to data consideration which, with certain limitations, permits EPA to consider the data in assessing any applications to which they are relevant.

As originally enacted in 1947 (ch. 125, 61 Stat. 163), FIFRA did not prohibit USDA from considering relevant data supplied to it by one applicant to determine whether to register the products of other companies. Because many of the pesticides for which registrations were sought were the same or substantially the same as previously registered products supported by data submitted to USDA (see S. Rep. No. 95-334, 95th Cong., 1st Sess. 7 (1977)), USDA was not obligated to require the later applicant to duplicate the tests that USDA already had in its

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[2] Hazard data consist of the following major types of studies: 1) acute toxicity studies, which define how poisonous the pesticide is when ingested, inhaled, or applied to the skin or eyes; 2) chronic toxicity studies, which are used to determine if chronic exposure to the pesticide will have any long-term health effects such as causing cancer or birth defects; 3) residue studies, which define the level of the pesticide and its degradation products which remain in the food; 4) environmental chemistry studies, which are used to determine how much of the pesticide and its degradation products remain in the environment after application; and 5) fish and wildlife studies, which define how toxic the pesticide is to fish and wildlife that may be exposed to the pesticide after application in the environment.

files. See *Amchem Products, Inc.* v. *GAF Corp.*, 391 F. Supp. 124, 127-128 & n.7 (N.D. Ga. 1975), remanded on other grounds, 529 F.2d 1257 (5th Cir. 1976). The 1947 law also contained no prohibition against disclosure of hazard and efficacy data, but it did specifically prohibit disclosure of product formulas (7 U.S.C. (1970 ed.) 135a(c)(4) and 135f(c)).

In 1972, FIFRA was substantially revised by the Federal Environmental Pesticide Control Act (Pub. L. No. 92-516, 86 Stat. 973) ("1972 Amendments")). One of the most significant changes was the addition of a new Section 10 (7 U.S.C. (1970 ed., Supp. II) 136h) governing disclosure of data submitted in support of applications for registration. That section allowed applicants to identify which portions of their data they regarded as "trade secrets or commercial or financial information" (Section 10(a)), and it prohibited the EPA Administrator from publicly disclosing any "information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential" (Section 10(b)). The 1972 Amendments did not, however, define the term "trade secrets."

In response to complaints from some sectors of the pesticide industry, Congress also added a new Section 3(c)(1)(D), 7 U.S.C. (1970 ed., Supp. II) 136a(c)(1)(D), which, for the first time, limited EPA's freedom to consider data submitted by one company in evaluating another company's application for registration.[3] Under Section 3(c)(1)(D),

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[3] Section 3(c)(1)(D) as enacted in 1972 is set forth at Pet. App. A-61 through A-62. The section was added at the request of industry representatives, notably the National

EPA was prohibited from considering "trade secret" information without the permission of the data-submitter. While it could consider all other types of information without the permission of the data submitter, it could do so in a given case only if the applicant "offered to pay reasonable compensation [to the data-submitter] for producing the test data to be relied upon." (*Ibid.*)

The 1972 Amendments left unclear whether the Section 3(c)(1)(D) limitations on consideration of data applied to all data in EPA's files prior to the effective date of the 1972 Amendments. To resolve this ambiguity, Congress amended Section 3(c)(1)(D) in 1975 to provide specifically that the limitations imposed by that section were applicable *only* to data submitted on or after January 1, 1970. FIFRA of 1975, Pub. L. No. 94-140, 89 Stat. 751, 755 ("1975 Amendments").[4]

The extent of the Section 10 disclosure limitation and the Section 3(c)(1)(D) data-consideration limi-

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Agricultural Chemicals Association, a pesticide industry trade association. See *Federal Pesticide Control Act of 1971: Hearings on H.R. 26, H.R. 1077, H.R. 1722, etc., Before the House Comm. on Agriculture*, 92d Cong., 1st Sess. 331 (1971).

[4] Section 3(c)(1)(D) as amended in 1975 is set forth at Pet. App. A-62 through A-63. Mobay Chemical Corporation challenged the 1975 Amendments on constitutional grounds, arguing that Section 3(c)(1)(D) caused an unconstitutional taking of its property rights in the data it had submitted prior to January 1, 1970. This claim was rejected by a three-judge court, which held that Section 3(c)(1)(D) did not "take" any of Mobay's property rights. *Mobay Chemical Corp.* v. *Costle*, 12 Envir. Rep. Cases 1572 (W.D. Mo. 1978). Mobay's direct appeal to this Court under 28 U.S.C. 1253 was dismissed on the ground that the three-judge court had been improperly convened. 439 U.S. 320 (1979). No appeal was taken to the Eighth Circuit.

tation remained unclear in other respects, however, because of Congress's failure to define the term "trade secret". EPA took the view that, in the 1972 and 1975 Amendments, Congress had intended to give trade secret protection to only a narrow range of data—principally statements of formulas and manufacturing processes. EPA thus concluded that most hazard and efficacy data could be disclosed to the public and could be considered by EPA in evaluating registration applications without the permission of the data-submitter. Data-submitting firms successfully challenged this interpretation in the courts, obtaining decisions holding that the 1972 Congress had intended the "trade secret" prohibition to apply to any data, including hazard and efficacy data, that met the criteria specified in Section 757 of the *Restatement of Torts* (1939). *E.g.*, *Chevron Chemical Co.* v. *Costle*, 443 F. Supp. 1024 (N.D. Cal. 1978); *Mobay Chemical Corp.* v. *Costle*, 447 F. Supp. 811 (W.D. Mo. 1978). As a result of these decisions, the "trade secret" prohibition in Section 10 operated to bar public access to much of the data on which EPA based its decisions to register pesticides. The corresponding prohibition in Section 3(c)(1)(D) allowed data-submitters to prevent any other firm from obtaining registrations for products that were the same or substantially the same as previously registered products unless the second firm duplicated the data supporting the first registration or it was determined, after perhaps years of litigation, that particular items of data were not trade secrets. In part because of such "trade secret" controversies, the process of registering new pesticides ground to a halt. See H.R. Rep. No. 95-663, 95th Cong., 1st Sess. 18 (1977); S. Rep. No. 95-334, 95th Cong., 1st Sess. 3 (1977).

In 1978, Congress again amended FIFRA, enacting the Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 ("1978 Amendments"). It substantially changed Section 3(c)(1)(D) and Section 10 in order to cure the problems caused by the courts' interpretation of the term "trade secret." A new provision, Section 10(d)(7 U.S.C. (Supp. III) 136h(d)), was added, making certain hazard and efficacy data available for public disclosure; and the 1972 Section 3(c)(1)(D) prohibition on agency consideration of "trade secret" data was abolished. Congress recognized that a regulatory scheme under which only registered pesticides of proven safety and effectiveness could be marketed gave an unfair competitive advantage to certain large manufacturers, who were protected from competition even after any patent had expired. Small potential competitors were discouraged from entering the market by the necessity of duplicating safety and efficacy tests for products already established as safe and effective by data that were contained in agency files but were rendered inaccessible by statute. See, *e.g.*, S. Rep. No. 95-334, 95th Cong., 1st Sess. 8, 30-31 (1977); see also 124 Cong. Rec. S15303-S15304 (daily ed. Sept. 18, 1978) (remarks of Sen. Leahy). In place of the flat prohibition on agency consideration of "trade secret" data, Congress amended Section 3(c)(1)(D) to establish a comprehensive scheme governing EPA's consideration of test data submitted by earlier pesticide registrants. For data submitted in support of applications for certain initial registrations filed after the effective date of the 1978 Amendments, Congress established a 10-year period during which the Administrator could not consider such data in support of an application for registration of a pesticide substantially like the one already registered unless the

Administrator had the written permission of the original data submitter (Section 3(c)(1)(D)(i), 7 U.S.C. (Supp. III) 136a(c)(1)(D)(i)). For data that did not fall within that category but that were submitted after December 31, 1969, in support of various types of applications (*e.g.*, initial registration, experimental use), a 15-year period was established during which the Administator could consider the data in connection with another company's application for registration without the data-submitter's permission, so long as the later applicant offered compensation to the data-submitter (Section 3(c)(1)(D)(ii), 7 U.S.C. (Supp. III) 136a(c)(1)(D)(ii)). (If the parties cannot agree on compensation, the amount is fixed by an arbitrator (*Ibid.*).) After the expiration of such exclusive-use and required-compensation periods, the Administrator may consider data in support of any application without either written permission or compensation arrangements (Section 3(c)(1)(D)(iii), 7 U.S.C. (Supp. III) 136a(c)(1)(D)(iii)).

2. In its amended complaint in the United States District Court for the District of Delaware, petitioner sought to enjoin the Administrator from issuing registrations to other companies for pesticide products containing the active ingredients naled and paraquat where the Administrator would be considering, in connection with those registration applications, hazard and efficacy data previously submitted by petitioner. The patents on naled, an insecticide, and paraquat, a herbicide, had expired in 1978, so that pesticides containing those compounds could be manufactured by companies other than petitioner if registrations could be obtained (Pet. App. A-39) Petitioner sought the injunction both as to registrations based on the Administrator's consideration of

data submitted by petitioner after December 31, 1969 ("post-1969 data")—data for which the new applicants are required to offer compensation—and as to registrations based on the Administrator's consideration of data submitted by petitioner before December 31, 1969 ("pre-1970 data"), for which no compensation was being offered by the applicants (*id.* at A-39 through A-41). Petitioner argued that both the pre-1970 and the post-1969 test data included trade secrets and that consideration of those data by the Administrator in connection with registration applications of other companies constituted a taking, without just compensation, of petitioner's property rights in the trade secrets (*id.* at A-40). Petitioner also contended, *inter alia*, that FIFRA as amended in 1978 did not authorize the Administrator to consider pre-1970 data (*ibid.*).

3. The district court granted summary judgment in favor of EPA. It concluded that the Administrator's consideration of pre-1970 data in connection with the registration applications of other persons was authorized by Congress in the 1978 amendments to FIFRA (Pet. App. A-41 through A-48). It also held (*id.* at A-52 through A-55) that even if the Administrator's consideration of either pre-1970 or post-1969 data under the terms of Section 3(c)(1)(D) constituted a taking of property within the meaning of the Fifth Amendment, the Administrator's actions could not be enjoined because a remedy under the Tucker Act, 28 U.S.C. 1491, was available in the Court of Claims.

The court of appeals affirmed the district court's judgment, in part on different grounds. As to pre-1970 test data, it concluded (Pet. App. A-20 through A-21) that Congress intended to leave intact what

it understood to be an established agency practice of consulting data in agency files when passing on pesticide registration applications filed by persons other than the original data-submitters. As to the "taking" issue, the court held (*id.* at A-22 through A-26) that there could be no taking because the particular interest asserted by petitioner in the data it had submitted to the government was not a property right. It explained (*id.* at A-23 through A-24) that where a company such as petitioner submits data to any agency to obtain a license to sell a product in interstate commerce, the company does not possess an unlimited property right in those data entitling it to prohibit or receive compensation for subsequent internal agency uses of the data in the performance of the agency's statutory functions that might in some way aid the company's competitors. The court had no occasion to consider the question whether petitioner possessed a property right against agency *disclosure* of the data because petitioner did not challenge the public disclosure provisions in Section 10 of the 1978 Amendments (Pet. App. A-24 through A-25 & n.27).

ARGUMENT

Both courts below correctly rejected petitioner's contentions and no conflict with decisions of this Court or of any other court of appeals is presented. Accordingly, further review is unwarranted.

1. Petitioner contends (Pet. 12-16) that it is entitled to an injunction against EPA's consideration of petitioner's pre-1970 hazard and efficacy data in connection with the issuance of pesticide registrations to other companies for the sale of substantially the same products because, petitioner argues, such

agency consideration is ultra vires. For the reasons stated by the district court (Pet. App. A-41 through A-48) and implicitly approved by the court of appeals, although expressed in somewhat different terms, this contention is without merit.

As explained above (pages 7-8), in 1978 Congress undertook a thoroughgoing revision of the FIFRA provisions for the treatment of pesticide hazard and efficacy data because the 1975 provisions, in operation, had resulted in a virtually total obstruction of the pesticide registration process. In Section 3(c)(1)(D)(iii), Congress provided that the agency was entirely free to consider data as to which any period for exclusive use or compensation had expired. As the district court observed (Pet. App. A-46 through A-48), reading this provision broadly to encompass pre-1970 data—data for which such periods had essentially expired upon the effective date of the 1978 Amendments—is in keeping with Congress's intent to alleviate the anticompetitive effects of the registration and test data requirements by reducing the possibility that the producers of pesticides on which the patents had expired would enjoy a de facto extension of their monopolies by virtue of the registration barrier faced by smaller competitors. See S. Rep. No. 95-334, 95th Cong., 1st Sess. 31 (1977). The district court was thus properly reading the statute "in the light of the mischief to be corrected and the end to be attained." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944), quoting *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259 (1940).

Adopting the narrower reading urged by petitioner would, as the district court noted (Pet. App. A-48 n.6), lead to the anomalous result that post-1969 data for unpatentable or expired-patent pesticides coming

within Section 3(c)(1)(D) could be considered by EPA without compensation as early as 1985, whereas data submitted long before 1970 could not be so considered even though an indefinite de facto monopoly might thereby be secured by the data-submitter.[5]

Finally, the cases cited by petitioner do not hold that, absent statutory prohibitions, an agency lacks authority to make internal use of trade secret data

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[5] As the district court noted (Pet. App. A-43 through A-44), if the Congress that enacted the 1978 amendments had had the benefit of this Court's decision in *Mobay Chemical Corp.* v. *Costle*, 439 U.S. 320 (1979), construing FIFRA as amended in 1975, it might have seen fit to express its intent in the 1978 amendments more clearly. In *Mobay*, in the course of determining that a three-judge court had been improperly convened (see note 4, *supra*), this Court construed FIFRA, as amended in 1975, as not addressing "the issues of the conditions under which pre-1970 data may be used in considering another application" (439 U.S. at 320). It appears, however, that the 1978 Congress was under the impression that the 1975 scheme *had* contemplated unrestricted internal use by EPA of pre-1970 data. Because the Court in *Mobay* did not consider FIFRA as amended in 1978, *Mobay* has virtually no bearing on this case.

Petitioner's attack (Pet. 15) on the court of appeals' characterization of the 1975 scheme as in conflict with this Court's holding in *Mobay* is essentially an attack on dictum since the 1975 scheme is not at issue here. To be sure, the court of appeals stated that the 1978 Amendments left pre-1970 data in the same "posture" as was the case under the 1975 Amendments—"that is, subject to the agency practice of consulting its files when passing on new applications for registration" (Pet. App. A-20 through A-21). But the court concluded (*id.* at A-21) that Congress in 1978 made a conscious decision not to impose compensation restrictions on agency use of pre-1970 data—*i.e.*, it refused to do so. This is another way of stating the conclusion of the district court—that FIFRA as amended in 1978 contemplates internal agency use of pre-1970 data and thereby implicitly authorizes it.

that have been submitted to it in connection with a regulatory program, where it uses those data in the course of carrying out clearly authorized regulatory actions, such as the issuance of pesticide registrations. (Whether such use, although authorized, would amount to a taking of property is, of course, a separate question.) Such internal agency use is plainly distinguishable from the act in question in *Kramer* v. *The Secretary of the Army*, No. 79-828 (2d Cir. July 16, 1980) (Pet. App. A-68 through A-80), a Federal Tort Claims Act case in which employees acting for the government in its proprietary role as a purchaser of equipment were alleged to have obtained a trade secret from one bidder and disclosed it to another bidder whom they preferred. Neither the government's proprietary interests nor public disclosure of trade secret data is at issue here.

2. In both courts below petitioner argued that, if authorized by statute, EPA's consideration of hazard and efficacy test data in connection with the issuance of pesticide registrations to other firms would constitute a taking of its property without just compensation (see Pet. App. A-49, A-22). Petitioner appears to be making essentially the same argument in this Court (Pet. 8-12, 14) although in more oblique terms. There is no merit to petitioner's taking claim.[6]

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[6] Petitioner does not expressly state that EPA's reliance on the pre-1970 naled and paraquat data in issuing pesticide registrations to other firms constitutes a taking within the meaning of the Fifth Amendment, but its attack on the court of appeals' treatment of its rights in those data is an attack on the court of appeals' resolution of petitioner's taking claim. Unless petitioner urges the correctness of that claim, the property right question is clearly inappropriate for review by the Court, even assuming the existence of a conflict. "This Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

We do not dispute petitioner's statement (Pet. 10) that California law and Delaware law recognize a property right in trade secrets. Neither do we contend that the holdings of the state cases cited by petitioner (*ibid.*) do not represent the law of those states. We agree that in California and Delaware the owner of a trade secret is entitled to legal and equitable remedies against others to whom he has given the secret in confidence if they exploit the secret for their own commercial profit in violation of the terms of an express agreement barring or conditioning use of the secret (*e.g.*, upon payment of royalties specified in a contract).

That is not the situation here, however. The question in this case, as the court of appeals noted (Pet. App. A-24 through A-25), is whether state law by itself creates, or may create, a legitimate expectation that a federal agency to which data containing trade secrets is disclosed will not make internal use of the information in the course of operating a regulatory program, if some benefit would accrue, as a result, to the data-submitter's private competitors. Petitioner has cited no decision of this Court or of any court of appeals confirming the existence of such a state-protected right. And to the extent that petitioner suggests that Congress is powerless to alter rights under state trade secret law, its claim is refuted by *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974). In *Kewanee* the Court held that federal patent law had not preempted the state law of trade secrets at issue there, but the clear assumption was that there is no constitutional impediment to such preemption.

In any event, even assuming that petitioner continues to possess some property right in its data as they exist in the agency's files, petitioner has not

shown that a taking occurs by virtue of the limited interference with that right occasioned by the agency's internal consideration of the data to achieve the public purposes defined in the statute. One of those purposes is to reduce somewhat the commercial advantage that earlier versions of FIFRA extended to some of the earliest data-submitters, such as petitioner (see pages 4-6, *supra*); this statutory scheme is a reasonable one for which "justice and fairness" embodied in the Fifth Amendment do not require compensation. See *Agins* v. *City of Tiburon*, 447 U.S. 255, 262-263 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-125 (1978).[7]

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[7] Petitioner's argument (Pet. 8-9) that the statute will unreasonably dampen "incentive for research" has no relevance to the issue in this case, which concerns only the statute's treatment of data compiled before 1970.

We note that a number of cases involving broader challenges to Section 3(c)(1)(D) of the 1978 Amendments, challenges to Section 10, or challenges to both sections are pending in the lower courts. *Mobay Chemical Corp.* v. *Costle*, Civil Action No. 79-591D (W.D. Pa., filed May 1, 1979); *Pennwalt Corp.* v. *EPA*, Civ. Action No. 80-2400 (E.D. Pa., filed June 20, 1980); *American Cyanamid Co.* v. *Costle*, Civil Action No. 77-226 (D. N.J., filed Feb. 4, 1977); *Petrolite Corp.* v. *EPA*, Civ. Action No. 80-798 (D.D.C., filed March 28, 1980); *Dow Chemical Co.* v. *Costle*, Civil Action No. 76-10087 (E.D. Mich., filed Sept. 9, 1976); *Monsanto Co.* v. *Costle*, Civil Action No. 79-0366-C(i) (E.D. Mo., filed March 30, 1979); *Thompson-Hayward Co.* v. *Costle*, Civil Action No. 79-2308 (D. Kan., filed Nov. 15, 1979). On March 23, 1981, this Court denied a petition for certiorari in No. 80-1085, *Union Carbide Agricultural Products Co., Inc.* v. *Barber*, declining to review the court of appeals' reversal of the grant of a preliminary injunction, and that case is now pending in the district court. Several cases involving the construction

Finally, if EPA's reliance on petitioner's pre-1970 data in its issuance of pesticide registrations to other companies would constitute a taking of property, petitioner's remedy is, as the district court held, a suit for damages under the Tucker Act, 28 U.S.C. 1491, not an injunction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ANNE S. ALMY
PATRICK J. CAFFERTY, JR.
Attorneys

MAY 1981

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of Section 3(c)(1)(D) have been litigated. See, *e.g.*, *Rohm and Haas Co.* v. *EPA*, Civil Action No. 81-1847 (E.D. Pa. May 18, 1981), aff'd per curiam, No. 81-1757 (3d Cir. May 26, 1981).

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